

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. E258 OF 2026

STEPHEN NDWARU GICHERU..... PETITIONER/APPLICANT

VERSUS

THE MAIROBI HOSPITAL.....1ST RESPONDENT

THE CHIEF EXECUTIVE OFFICER,

THE NAIROBI HOSPITAL.....2ND RESPONDENT

RULING

1. The Petitioner/ applicant **STEPHEN NDWARU GICHERU** is before this Court with a petition dated 22nd April 2026 and two applications dated 22nd and 23rd April 2026 respectively, which essentially seek for reliefs to declare that his detention at the Respondents' Hospital after being discharged following an open heart surgery, on account of non-payment of balance of the hospital bill, occasioned by the decline by the Insurance Company to settle the bill, is unconstitutional, and violative of his right to liberty which right is guaranteed under Articles 29, 28,39 and 47 of the Constitution.
2. In the interlocutory applications, the Petitioner/ applicant seeks for a mandatory order releasing him from the Respondents' Hospital, asserting in

his affidavits in support that despite his family undertaking to settle the accrued hospital bill and showing good faith by paying one million Kenya shillings. According to the Petitioner, following his discharge from hospital, it is apparent that any post operative care required has to be obtained from his home and not at the Respondents' hospital where additional exorbitant bills, are being incurred thereby subjecting him and his family to economic hardship and risks of not receiving proper post operative care.

3. That despite demands for release of the petitioner, the Respondents have declined to do so, demanding for settlement of the entire outstanding hospital bill which continues to accrue hence this petition and applications.
4. Upon being served with the petition and applications, the respondents appeared today through Ms Munuhe advocate who informed the court that the parties were negotiating for an amicable settlement which should be concluded within the three days, with the next of kin for the petitioner whom they had met on 17th April, 2026, expected to submit a proposal for settlement of the outstanding bill. Ms Munuhe submitted that the hospital continues to give the petitioner post operative care services hence he was not in any danger at all
5. In a rejoinder, Mr. Odiyo counsel for the petitioner submitted that the negotiations alluded to by Ms Munuhe had since collapsed and that the family of the Petitioner were committed to settling the bill but all they

needed was the release of the petitioner from hospital, following his discharge and that the petitioner was not opposed to negotiations.

Analysis and Determination

6. I have considered the brief submissions by parties' counsel on whether or not I should grant an interim mandatory conservatory order for release of the petitioner from the respondents' hospital pending interpartes hearing of the substantive motions dated 22nd and 23rd April, 2026.
7. This Court is aware that a mandatory conservatory order has some form of finality in it and therefore should only be granted in the interim, in exceptional circumstances.
8. The right to personal liberty is one of the most fundamental human rights as it affects the vital elements of an individual's physical freedom. **Article 9** of the **Universal Declaration of Human Rights** provides that; '*no one shall be subjected to arbitrary arrest, detention or exile*'. Similarly, **Article 9(1)** of the **International Covenant on Civil and Political Rights (ICCPR)** secures the right to liberty and security of the person in the following terms; "*9. (1). Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*" **Article 11** of the **ICCPR** further states that, "*No one shall be imprisoned merely on the ground of inability to*

fulfil a contractual obligation.” The provisions of the **Article 2(5)** and **2(6)** of the Constitution incorporate into Kenyan Law the Convention (see ***Re Zipporah Wambui Mathara Milimani BC Cause No. 19 of 2010 (Unreported)***).

9. Courts have extensively dealt with the issue of detention arising out of failure to fulfil a contractual debt and it is therefore expected that Ms Munuhe would have advised the respondents sufficiently, to avoid such scenario and litigation by patients in similar circumstances, thereby unnecessarily attracting expense that can be avoided.
10. Where issues have been settled by courts, it becomes a waste of judicial time and resources to render decision after decision saying the same thing to very informed parties. This Court can also not fail to acknowledge such decisions in this ruling as it is not about to render a different decision where the law is already settled.
11. In the case of ***Ndegwa v Republic (1985) KLR 534***, long before the promulgation of the 2010 Constitution, the court observed that:

“No rule of natural justice, no rule of statutory protection, no rule of evidence and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject. He is the most sacrosanct individual in the system of our legal administration.”

12. In the post 2010 case of **Sonia Kwamboka Rasugu v Sandalwood Hotel & Resort Limited T/A Paradise Beach Resort & Another [2013] KEHC 4134 (KLR)**, a case involving detention for failure to pay a hotel bill, the High Court held that the detaining a person for non-payment or failure to pay a contractual debt was a violation of **Article 29(a)** of the Constitution which provides that, ***“Every person has the right to freedom and security of the person, which includes the right not to be – (a) deprived of freedom arbitrarily or without just cause.”***
13. The court further held that such detention was a violation of the right to dignity contrary to **Article 28** of the Constitution. In other words, the subject of this Petition is a legal path which, by now, is a well-trodden one.
14. In this case, there is no dispute that the petitioner was discharged from Hospital on 27th March 2026 as per the Doctor’s review notes of 26th March, 2026 and that the respondents communicated this discharge vide their email dated 30th March, 2026 at 8.09 am to the family of the petitioner Jackie and Virginia, indicating the gross bill, PACIS undertaking, SHA package and net amount.
15. The respondents concede, through their counsel Ms Munuhe that part of the Hospital Bill as accrued has been settled to the tune of one million Kenya shillings. On 9th April, 2026, Counsel for the Petitioner wrote a letter asking that the petitioner be released to continue receiving medical care post

operation elsewhere but the respondents have declined to release him even with undertakings by his family to settle the outstanding bill.

16. In **Maina v Registered Trustees of the Sisters of Mercy (Kenya) t/a the Mater Misericordiae Hospital (Constitutional Petition E020 of 2021) [2023] KEHC 22347 (KLR) (Constitutional and Human Rights) (21 September 2023) (Judgment)**, Mrima J stated as follows regarding detention of patients by hospital for non-payment of accrued hospital bills:

“70. In a nutshell, health institutions cannot detain patients on account of unpaid medical bills and expenses. Since the relationship between the institution and the patient is always contractual, then the contract ought to provide for lawful ways of debt recovery. The contracts may also provide for ways of taking care of the bills and expenses from escalating way above.

71. Detaining a patient, therefore, is not one of the ways of debt recovery. The act runs contra various rights and fundamental freedoms provided in the Bill of Rights. They include Article 29 of the Constitution which provides that every person has the right to freedom and security of the person which includes the right not to be deprived of freedom arbitrarily or without just cause. There is also Article 39 which provides that every person has the right to freedom of movement. These constitutional provisions make it apparent that freedom and security of

a person cannot be limited without a just cause. Furthermore, Article 28 provides that every person has inherent dignity and the right to have the dignity respected and protected.

72. Several decisions have been rendered buttressing the foregoing. They include Sonia Kwamboka Rasugu v Sandalwood Hotel and Resort and another [2013] eKLR, MAO & another v Attorney General & 4 others [2015] eKLR, Tryphosa Jebet Koskey v Elgon View Hospital [2016] eKLR, Mary Nyang'anyi Nyaigero & Another v Karen Hospital Ltd & Another [2016] eKLR, Christine Kidha v Nairobi Women's Hospital [2016] eKLR, Veronicah Nyangai v Nairobi West Hospital Ltd [2017] eKLR among many others.

73. Detention is also condemned by international instruments which Kenya is a signatory. Article 2(6) of the Constitution recognizes general principles of international law and international treaties to which Kenya is a signatory as part of the Laws of Kenya. One of such instruments is the International Convention on Civil and Political Rights, (ICCPR) wherein Article 9(1) thereof provides as follows: - Everyone has the right to liberty and security of person. No one shall be subject to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

74. Internationally, the South African decision in Malachi v Cape Danle Academy International & another [2010] CCT 05/COZACC 13 attests to the above.

75. Having said as much on the unconstitutionality of healthy institutions detaining patients on account of unpaid medical bills and expenses, this Court reiterates the duty bestowed on every person (including entities) to defend the Constitution in Article 3. It is, therefore, a serious indictment for a person to disregard the provisions of the Constitution.”

17. What emerges from the judicial pronouncements cited above is the centrality of the liberty of the person and the protection from illegal and false imprisonment as one of the fundamental rights and freedoms enshrined in the Bill of rights.

18. Thus, any form of detention not authorized by law that seeks to procure performance of contractual debt is a violation of the right to liberty. It is also an affront to human dignity to detain someone on account of a debt, absent decree of a court.

19. Hospitals are entitled to settlement of their bills for treatment administered to patients, but that entitlement does not extend to the use of self-help mechanisms to enforce settlement of the bill by unlawfully detaining patients whose families have even given an undertaking to settle the

outstanding bills. The law does not condone the use of self-help when the means adopted is in fact contrary to the law and a violation of one's fundamental rights and freedoms.

29. In the case of **Sunbolf v Alford (1838) 3 M & W 248, 150 ER 1135**, it was held that an inn keeper cannot detain the person of his guest in order to secure payment of his bill. The English Court stated:

“If an Innkeeper has a right to detain the person of his guest for non-payment of his bill, he has a right to detain him until the bill is paid, which may be life.... The proposition is monstrous. Again, if he has any right to detain the person, surely he is the judge in his own cause...”

30. **Article 24(1)** of the Constitution is clear that a right or fundamental freedom in the Bill of rights is not to be limited except by law and only to the extent that such limitation is reasonable and justifiable in an open and democratic society. It cannot be a policy of the Hospital to detain patients after discharge, or to refuse to discharge them until the accrued bill is settled. That policy is not constitutionally sound.

31. I am satisfied that this is one of those exceptional cases where a mandatory order compelling immediate release of the petitioner is warranted, having regard to the material placed before me.

32. Accordingly, I hereby order that the Respondents shall, upon being served with this Order, immediately release the petitioner **STEPHEN NDWARU GICHERU** accompanied by all his medical records for post operative follow up medical care services, to his next of kin who shall sign an undertaking to settle any outstanding lawful medical bill incurred by the petitioner at the 1st Respondent Hospital.

33. Parties to appear in court on 21/5/2026 for further directions issues.

Dated, Signed and Delivered at Nairobi and uploaded in the Case Tracking System as directed this Morning to the parties' counsel present this 28th Day of April, 2026

R.E. ABURILI

JUDGE